Filed 7/12/19 Trusty v. Ayala CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| VIDA MAY TRUSTY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>JUAN AYALA et al.,<br><br>Defendants and Respondents. | B285905<br><br>(Los Angeles County Super. Ct. No. BC530687) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Bobbi Tillmon, Judge. Affirmed.

Mary E. Cochran for Plaintiff and Appellant.

Robie & Matthai, Kyle Kveton, for Defendants and Respondents.

## I. INTRODUCTION

Plaintiff and appellant Vida May Trusty drove her vehicle into the side of a work truck driven by defendant and respondent

Juan Ayala. Trusty brought a negligence action against Ayala and his employer, codefendant and respondent T&M Wholesale Supply, Inc. (T&M). The jury found no negligence and the trial court entered a judgment for defendants. Although Trusty's arguments on appeal are not entirely clear, she seems to contend that the trial court erred when it failed to answer a jury question prior to the jury's returning of a verdict and also erred when it failed to ask the jury how it voted on "that issue." She contends that she was prejudiced by the trial court's purported errors. We affirm.

## II. BACKGROUND[1]

On February 5, 2013, Ayala was in an accident on Washington Boulevard in Los Angeles as he was driving to T&M, where he had worked as a driver since 2007. Ayala was driving a truck—a bobtail with a long trailer. He had driven that truck daily for the entire time he worked for T&M.

At the time of the accident, Ayala was backing his truck into T&M's driveway. He was backing in rather than driving in forward because it was easier to unload his truck if he backed in

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[1] It appears that at least four witnesses testified at trial: Trusty; Ayala; Stephen Blewett, a defense accident reconstruction expert; and Troy Donahue Guerrero, an "independent" witness. We are unable to determine whether additional witnesses testified because Trusty's record on appeal does not contain any minute order prior to the last day of trial. Of the four known witnesses, Trusty has provided a reporter's transcript only of Ayala's testimony. We summarize that testimony here for context. As we discuss below, the record on appeal is inadequate.

and because it was safer as there was insufficient room to turn his truck around at the T&M facility.

Ayala explained how he positioned his truck so that he could back into the T&M facility: when he exited the freeway, he turned right onto La Brea and then right onto Washington. There, Ayala parked his truck on the side of the road near T&M's driveway and waited for the traffic signal at the La Brea and Washington intersection to turn red so there would not be any traffic when he backed into the T&M facility.

From his parked position, Ayala drove to "the middle." He then began slowly backing into the T&M facility, using his side view mirrors to look for traffic and pedestrians behind him—the area had a lot of homeless and mentally ill people. He had used the same maneuver to enter the T&M facility for the entire time he worked for T&M.

As Ayala was backing into the T&M facility, his truck extended across and blocked three traffic lanes on Washington, beginning with the lane closest to the curb. He was traveling two miles per hour or less when Trusty's vehicle struck the middle of his truck. The impact moved his truck six feet to the side.[2] He estimated he was blocking the lanes for about two seconds, explaining that he blocked the lanes for the period of time it took to shift gears into reverse and to back into the T&M facility.

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[2] According to Trusty's new trial motion, "Guerrero's testimony also confirmed defendant Ayala's testimony that he was backing up at the time of the accident. He testified that he thought [Trusty] was on a cell phone but changed and said maybe not a cell phone but she had her hand up near her face. He stated he thought she was travelling approximately 30 miles per hour at the time of the accident."

Ayala estimated the distance from the intersection at La Brea and Washington to T&M's driveway to be about 150 feet.[3] Ayala did not see Trusty "anywhere in that 150 feet," and did not hear a horn honk, brakes, or tires screech before Trusty's vehicle struck his truck.

At 11:42 a.m., on August 10, 2017, the jury began deliberations. At 12:10 p.m., it "buzz[ed]" with a question: "[Does] pg 34 of instructions apply to Washington [B]lvd in this case?"[4] At 12:15 p.m., the jury "buzz[ed]" that it had reached a verdict. At 12:16 p.m., after conferring with the parties, the trial court sent the jury the following response: "'Highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." At 12:25 p.m., the jury returned to the courtroom with a verdict.

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[3] In denying Trusty's new trial motion, the trial court, apparently referring to evidence not in the record on appeal, stated the distance from the intersection to the driveway was 245 feet, observing that Ayala "was blocking three lanes of traffic and yet after 245 feet [Trusty] ran into the middle of [his] truck. There's no evidence as I recall of skid marks which would support an attempt to stop [Trusty]'s vehicle."

[4] Trusty did not make the jury instructions a part of the record on appeal. However, according to Trusty, the instruction about which the jury had a question was a special instruction that quoted Vehicle Code section 22106 as follows: "'No person shall start a vehicle stopped, standing, or parked on a highway, nor shall any person back a vehicle on a highway until such movement can be made with reasonable safety.'"

## III. DISCUSSION

### A. *The Trial Court Answered the Jury's Question*

Among her arguments, Trusty contends in her reply brief that the trial court's response to the jury question "was never provided to the jury for further deliberation." The record, as described above, is to the contrary. Nonetheless, Trusty cites to the trial court's statement at the hearing on plaintiff's motion for new trial and motion for judgment notwithstanding the verdict in support of her assertion. The trial court stated, "Since there's no evidence that the jurors failed to continue to deliberate as they were instructed when they presented a question, they're [*sic*] reaching a verdict before receiving an answer is appropriate." This statement is consistent with the record, that the jury buzzed that it had reached a verdict before receiving the trial court's response to its question. But it does not support a conclusion that the jury did not receive the trial court's response to its question prior to returning its verdict in open court. To the contrary, although the jury reached a verdict prior to receiving the trial court's answer, the jury had that answer for about 10 minutes before it announced its verdict in court. Trusty fails to show that the jury did not resume deliberations after receiving the trial court's answer[5] and that the verdict ultimately given to the trial court did not reflect any such deliberations.

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[5] Although not relied on in her briefs on appeal, in a declaration in support of a motion for judgment notwithstanding the verdict, Trusty's trial counsel declared that the jury did not resume deliberations after it received the trial court's answer and before it delivered its verdict. However, the trial court made no

To the extent Trusty contends that the jury was prohibited from continuing its deliberations while the trial court answered its question, CACI No. 5009 directed the jury to continue deliberating while it waited for the trial court to answer its question. CACI No. 5009 provides, in relevant part: "[J]urors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. *You should continue your deliberations while you wait for my answer*." (Italics added.)

B. *No Obligation to Ask the How Jury "Voted" on the Question Asked*

Trusty also contends the trial court erred by failing to ask the jury how "they voted on the question asked," as required by CACI No. 5009. We disagree.

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finding on this point in ruling on Trusty's motion and we are unable to determine whether defendants contested the point as Trusty did not include defendants' opposition to the motion in the record on appeal.

Even if the jury had some unresolved issue with the Vehicle Code section 22106 instruction at the time it returned its verdict, the jury, according to Trusty, also was instructed with CACI No. 700 (Basic Standard of Care), an essentially duplicative instruction about which the jury had no question. CACI No. 700 provides, "A person must use reasonable care in driving a vehicle. Drivers must keep a lookout for pedestrians, obstacles, and other vehicles. They must also control the speed and movement of their vehicles. The failure to use reasonable care in driving a vehicle is negligence[.]"

"The propriety of jury instructions is a question of law that we review de novo. [Citation.]" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) "[W]hen deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-581, fn. omitted.)

CACI No. 5009 does not require a jury to "vote" on a particular response. On this point, CACI No. 5009 instructs a jury, "When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court." Trusty seems to interpret this language as requiring that the trial court "ask for this information," that is, "how you voted." But that is an unreasonable reading of CACI No. 5009. While there are instances when a trial court may inquire about a vote on an issue, such as in the case of a deadlocked jury, there is no requirement in CACI No. 5009 that the trial court must inquire about "a vote," beyond receiving a jury verdict and upon request, polling the jury.

### C. *Even if the Trial Court Had Erred, Trusty Has Not Demonstrated Prejudice*

Trusty next seems to contend that she was prejudiced by the trial court's purported errors. "Waiting for the judge's response to their question regarding this pivotal law may have resulted in the jury reaching a different verdict." Even if the trial

court had erred—and we conclude it did not—Trusty's prejudice argument would fail because the record on appeal is inadequate.

"'"A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." [Citation]'" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 (*Gee*), italics omitted.)

"Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence. [Citations.]" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992 (*Fain*); *Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 302 (*Uniroyal*) [a necessary corollary to the rule that an appellant must affirmatively show error by an adequate record "would seem to be that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed"].)

Trusty failed to make a part of the record on appeal the following: her complaint; defendants' answer; every minute order

prior to the last day of trial; the trial exhibits; the jury instructions; and a reporter's transcript of her testimony, Guerrero's testimony, and Blewett's testimony. At a minimum, a reporter's transcript of the missing witnesses' testimony is essential for a determination of whether Trusty was prejudiced by any irregularity in the jury instructions and the jury's deliberations. Accordingly, the record on appeal is inadequate and Trusty's argument fails. (*Gee, supra,* 99 Cal.App.4th at p. 1416; *Fain, supra,* 75 Cal.App.4th at p. 992; *Uniroyal, supra,* 203 Cal.App.3d at p. 302.)

## IV. DISPOSITION

The judgment is affirmed. Ayala and T&M are awarded their costs on appeal.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.